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September 2, 1993

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Bell Companies - Petition For Rulemaking, RM 8303

Dear Mr. Caton:

On behalf of Capital Network System, Inc., I enclose an original and five copies of an opposition to the above-captioned petition for rulemaking filed by five Bell Operating Companies ("BOCs"). As discussed in footnote 1 of the enclosed opposition, the Commission provided public notice of the BOCs' petition initially on July 29, 1993, and again in a corrected notice on August 3, 1993. The Common Carrier Bureau Policy and Planning Division advised counsel for CNS by telephone that the date for filing oppositions will be calculated as of the date of the second, corrected notice. Thus, CNS files this opposition on September 2, 1993.

Please call the undersigned if you have any questions.

Sincerely,

Timothy J. Cooney

Timothy J. Cooney

TJC/mtd

Enclosures

DOCKET FILE COPY ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In The Matter Of

PETITION FOR RULEMAKING TO DETERMINE THE TERMS AND CONDITIONS UNDER WHICH TIER 1 LECS SHOULD BE PERMITTED TO PROVIDE INTERLATA TELECOMMUNICATIONS SERVICES	)	RM - 8303

OPPOSITION OF CAPITAL NETWORK SYSTEM, INC.

RANDOLPH J. MAY
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September 2, 1993

ITS ATTORNEYS

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SUMMARY

Capital Network System, Inc. ("CNS") opposes the Petition For Rulemaking in which five Bell Operating Companies ("BOCs") request the Commission to initiate a rulemaking to determine the appropriate terms and conditions under which the BOCs should be permitted to provide interexchange telecommunication services. The five BOCs further ask the Commission to find that "BOC provision of a full range of interLATA services is in the public interest." As an interexchange carrier ("IXC") founded in 1988 (after the MFJ antitrust court decree established the current industry structure in which the BOCs are barred from providing interexchange services in order to prevent them from discriminating against competing IXCs), CNS has a substantial interest in this proceeding. CNS is almost totally dependent upon BOC bottleneck exchange facilities to originate and terminate "1+" and "0" interexchange calls for its customers.

As the BOCs are well aware, the Commission has no legal authority to remove the antitrust consent decree prohibition against BOC provision of interexchange services. The Commission, therefore, should exercise its authority under Section 1.401(e) of the Commission's rules to deny or dismiss the BOCs' Petition. The Petition is moot (no Commission rule prohibits the BOCs from providing interexchange services), premature (absent prior judicial or Congressional relief, grant of the Petition would not allow the BOCs to provide interexchange services), unwise (initiation of a controversial rulemaking would be a waste of scarce Commission resources and also private resources because any rules actually adopted could not be applied until after action by another branch of government over which the Commission has no control). Even more fundamentally, grant of the BOCs' Petition would establish an unnecessary conflict with Article III courts responsible for enforcing antitrust decrees and would intrude improperly into an area of Congressional policy making, raising serious separation of powers issues.

Alternatively, the Commission should deny the BOCs' Petition on substantive grounds. Non-structural safeguards such as those proposed by the BOCs cannot protect competing IXCs adequately from discriminatory and anti-competitive actions by BOCs allowed to provide interexchange services. The BOCs still retain the incentive and means to discriminate against competing IXCs. The Department of Justice, the courts and the Commission all agree that the BOCs continue to possess almost absolute monopoly control over local exchange service. The BOCs can use this bottleneck control to cross-subsidize their competitive interexchange services and to discriminate against competing IXC

providers. The Commission has no existing safeguards that could be modified easily to safeguard against such BOC anti-competitive actions. Therefore, even if the Commission does not dismiss the Petition summarily as moot and a waste of Commission resources -- which, in fact, it should do -- the Commission should deny the Petition on substantive grounds as unsound public policy.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In The Matter Of		
Petition For Rulemaking To Determine The Terms And Conditions Under Which Tier 1 LECs Should Be Permitted To Provide InterLATA Telecommunications Services	)))))	**RM - 8303**

OPPOSITION OF CAPITAL NETWORK SYSTEM, INC.

Capital Network System, Inc. ("CNS"), by its attorneys and pursuant to Section 1.405 of the Commissions's rules, hereby files this opposition to the above-captioned Petition For Rulemaking filed by BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, and Southwestern Bell Corporation (collectively, "the Bell Companies" or "BOCs").[1/] The Petition asks the Commission to initiate a rulemaking to determine the appropriate terms and conditions under which the five Bell Companies should be permitted to provide interLATA telecommunications services. The five Bell Companies further ask the Commission to find that "BOC provision of a full range of interLATA services is in the public interest." Petition at 1.

CNS, an interexchange carrier ("IXC") headquartered in Austin, Texas, has a substantial interest in the disposition of

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1/ The Commission provided public notice of the Petition initially on July 29, 1993, and again in a corrected notice on August 3, 1993. The Common Carrier Bureau Policy and Planning Division advised counsel for CNS by telephone that the date for filing oppositions will be calculated as of the date of the second, corrected notice.

the BOC Petition. CNS was founded in 1988, after the January 1, 1984, effective date of the Modified Final Judgment ("MFJ") antitrust consent decree that established the current industry structure in which the BOCs are barred from providing interexchange communications services.[2/] CNS's primary business is the provision of automated and live operator-assisted calling services, a competitive market that did not even exist prior to the entry of the MFJ. CNS assists end users in placing calls from CNS customer locations, including pay telephones, hotels, motels and other "traffic aggregators." Within the past year, CNS also has begun to provide "1+" interexchange service to residential and business customers. As it did with the development of its operator services business, CNS has invested hundred of thousands of dollars of capital in developing its emerging "1+" business. By providing high quality, innovative services to the public, CNS has created hundreds of new jobs since it began business in 1988.

In order to serve its customers, however, CNS is almost totally dependent on the facilities, billing and collection services, and validation data provided by the Bell Companies.[3/]

[2/] United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[3/] As a practical matter, local exchange carrier validation, billing and collection services often are the only cost effective means for small carriers to receive compensation for operator services because direct billing is expensive and yields too little revenue to be cost effective. Unless a call can be validated by an operator service provider ("OSP"), the OSP bears (continued...)

In the areas served by the Bell Companies, CNS is almost totally dependent upon them to originate and terminate calls in both the "1+" and "0" marketplaces. Because of this dependence, CNS is highly vulnerable to any discriminatory or anti-competitive practices of the Bell Companies.

I. BACKGROUND.

The interLATA prohibition that the Petition seeks to remove is one of the core line of business restrictions to which the Bell System agreed in order to settle the antitrust charges brought against it by the Department of Justice ("DOJ"). Section II(D) of the MFJ approved by the District Court provides as follows:

> After completion of the [AT&T divestiture], no BOC shall directly or indirectly or through any affiliated enterprise:
> 1. Provide interexchange telecommunications services or information services;
> 2. Manufacture or provide telecommunications products or customer premises equipment . . . or;
> 3. Provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.

When the decree was entered, the DOJ pledged to report to the court every three years on the continuing need for these lines of business restrictions. At the first triennial review in

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3/ (...continued)
the risk of non-collection if the calling card or billed telephone number is invalid. Unless an operator-assisted call can be billed and collected by a caller's local exchange carrier (in most cases a BOC), the OSP will have no practical ability to collect the charges for the call.

1987, the BOCs filed motions to remove all the line of business restrictions. The DOJ concurred with the BOC motions, except that it recommended retention of the interexchange prohibition on the condition that the Court entertain requests for waiver of that restriction as soon as state and local regulations lifted the BOCs exchange service monopolies in their areas.

The BOC and DOJ motions were hotly contested. The District Court received a total of about three hundred briefs, totalling some 6,000 pages, and heard oral arguments for three days.[4/] After extensive review of the record, the District Court issued two lengthy opinions lifting the restriction against BOC participation in non-telecommunication businesses, modifying the restriction against entering the information services market, and leaving in place the interexchange (interLATA) and manufacturing restrictions. U.S. v. Western Electric Co., 673 F. Supp. 525; U.S. v. Western Electric Co., 714 F. Supp. 1 (D.D.C. 1988).

Disappointed with the District Court's decisions, the BOCs appealed. With the exception of the District Court's ruling concerning information services, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's decisions. U.S. v. Western Electric Co., 900 F.2d 283 (D.C. Cir. 1990). In particular, the Court of Appeals affirmed the District Court's decision to retain the interexchange prohibition and the

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[4/] U.S. v. Western Electric Co., 673 F. Supp. 525, 529 (D.D.C. 1987).

District Court's conclusion that "the BOCs failed to show that there was no substantial possibility that they could use their monopoly power to impede competition in the interexchange market." Id. at 301.

Frustrated by their inability to modify the interexchange restriction through the judicial forum in which the restriction was established as an antitrust remedy, the BOCs now come before this Commission seeking an indirect, "back door" reversal of the District Court's findings of fact and conclusions of law. The arguments raised in the Petition do not differ in any substantive way from those that already have been rejected twice in the triennial review proceedings, first by the District Court and then by the D.C. Circuit. The Commission now should reject the BOC's attempt at wasteful and inefficient forum-shopping.

As discussed below, the Commission should dismiss the BOC Petition because the Commission has no authority to construe the antitrust decree or to reinterpret the courts' opinions. Grant of the Petition would embroil the Commission in unnecessary controversy and waste scarce Commission resources on an issue over which the Commission ultimately has no jurisdiction. If and when the interLATA restriction is ever lifted by the Courts or Congress, it will then be appropriate for the Commission to determine what changes in the regulatory regime are necessary to protect the public interest. Alternatively, the Commission should deny the Petition on substantive grounds in recognition

that Commission regulation could not adequately protect the IXC marketplace from anti-competitive actions if the BOCs were allowed to enter that market.

II. THE COMMISSION SHOULD DISMISS THE BOCS' PETITION AS MOOT, PREMATURE, AND WASTEFUL OF COMMISSION RESOURCES BECAUSE ANY RULES THE COMMISSION WOULD ADOPT COULD NOT BE APPLIED IN THE ABSENCE OF JUDICIAL OR CONGRESSIONAL ACTION.

Section 1.401(e) of the Commission's rules authorizes the Commission to deny or dismiss petitions for rulemaking which are "moot, premature, repetitive, frivolous or which plainly do not warrant consideration by the Commission." 47 C.F.R. §1.401(e). The Commission should exercise its authority to dismiss the BOCs' Petition in this case. The Petition is moot (no Commission rule prohibits the BOCs from providing the interLATA services they seek to provide), premature (absent prior judicial or Congressional action, grant of the requested relief would not allow the BOCs to provide interLATA services), frivolous (initiation of a rulemaking would be a waste of scarce Commission resources because any rules actually adopted could not be applied until after action by another branch of government over which the Commission has no control), and plainly does not warrant consideration by the Commission (grant of the BOCs' petition would establish an unnecessary conflict with Article III courts and irresponsibly intrude into an area of Congressional policy making).

A. The Court Of Appeals Has Not Invited The Commission To "Retake The Policy Initiative" In This Area.

The BOCs have misstated the principal factual predicate supposedly underlying their request for relief from the interLATA restriction. Contrary to the BOCs' claim, in affirming the District Court's decision to retain the interLATA prohibition the D.C. Circuit did not "[i]n effect . . . issue[ ] an explicit invitation to the Commission to retake the policy initiative in this area." Petition at 8. The BOCs' claim is based on a misrepresentation of what the Court of Appeals actually held concerning the interexchange prohibition.

At page 7 of the Petition, the BOCs claim that

> The Court decided, however, that the interLATA prohibition should not be lifted 'until [FCC] regulations are adjusted to take account of BOC entry into the interexchange market' (emphasis supplied, citation omitted).

The Court of Appeals decided no such thing. The statement quoted by the BOCs is the Court's paraphrase of the DOJ position.[5/] Although the Court found that DOJ's assessment was entitled to significant weight in determining whether the District Court's decision was supported by substantial evidence, the Court of Appeals in no way adopted the DOJ's position as its own. Nor did the Court "in effect issue an explicit invitation

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5/ The actual language of the Court's opinion is as follows: "And until those regulations are adjusted to take account of BOC entry into the interexchange market -- entry which would, of course, provide an incentive to deny equal access and to cross-subsidize if possible -- the DOJ represents that equal access and proper cost allocation cannot be assured." 900 F.2d at 301 (emphasis supplied).

to the Commission to retake the policy initiative." The invitation obviously is not very explicit if over three years passed before the parties most interested in the case even claimed that it was issued.[6/]

Moreover, if the DOJ position in the triennial review were considered a blueprint for removal of the interLATA prohibition -- which it is not -- the BOCs ignore without explanation the other DOJ admonitions paraphrased by the Court, "that violations of the equal access policy are extremely difficult to detect and remedy" and that "the BOCs will have an easier time acquiring market power in the interexchange markets than in other markets." Id. The Commission should not allow itself to be used as the BOCs' tool for the selective post hoc reinterpretation of the Court's opinion.

Indeed, the BOC Petition attempts to obscure the fundamental issues raised by its request. Contrary to the BOCs'

[6/] Another example of the BOCs' attempt to revise history is their claim that "[p]reviously monopolistic markets for customer premises equipment and long-distance service were pried open by the Commission." Petition at 3. In fact, of course, the courts, actually pried open these markets, first by overturning a Commission decision upholding an AT&T tariff restriction on CPE interconnection, Hush-A-Phone Corp. v. U.S., 238 F.2d 266 (D.C. Cir. 1956), and second by overturning the Commission's decision barring MCI from competing with AT&T's long-distance switched services monopoly, MCI Telecommunications Corp., 60 F.C.C. 2d 25 (1976), rev'd. and remanded sub nom. MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978). This is not to say the Commission hasn't played an important role in fostering the development of competition in the equipment and long-distance markets; it is only to point out that the Bell Companies' historical revisionism is not an argument for the Commission to grant their petition.

claim, the issue properly before the Commission is not whether "the most important decisions governing the nation's telecommunications industry" should be made by the Commission or "by a single district court judge overseeing an antitrust decree." Petition at 1. Rather, the real issue presented is whether the Commission has the authority in any way to overturn or remove the interLATA prohibition and, if the Commission does not have such authority, whether the Commission should attempt to undermine or interfere with those branches of government that do have such authority. The answer to the latter questions quite clearly is "no."

B. Grant Of The BOC Petition Would Be An Improper Intrusion Of An Independent Agency Into Issues Under Consideration By The Courts And Congress.

The BOCs implicitly acknowledge that, except for Congress, only the District Court can remove the interLATA restriction. See Petition at 2, 9. By asking this Commission outside of any ongoing judicial proceeding to affirm that the provision of interexchange services by the BOCs would serve the public interest, the BOCs invite the Commission to come into direct conflict with the District Court and with the provisions of an existing consent decree that has been the subject of extensive judicial review over the past decade. The District Court expressly has rejected the arguments that the restriction on BOC provision of interLATA services is unnecessary in light of more effective Commission regulation, U.S. v. AT&T, 552 F. Supp. 131, 187 n. 229 (D.D.C. 1982), U.S. v. Western Electric Co., 673

F. Supp. 525 at 541-48 and these decisions have been upheld on appeal. See Maryland v. U.S., 460 U.S. 1001 (1983) and U.S. v. Western Electric Co., 900 F.2d 283 at 301, respectively. The Commission should decline the BOCs' invitation to enter into a constitutional confrontation with the federal court system.[7/]

Under Article III of the Constitution, federal courts ultimately are responsible for interpreting and applying the laws enacted by Congress. Independent agencies such as the Commission may not act outside the limits prescribed by Congress, see, e.g., MCI Telecommunications Corp. v FCC, 765 F.2d 1186, 1195 (1985), and have no role in overseeing the work of the courts or reinterpreting their orders and decrees. Any attempt by the Commission to overturn an Article III court's decision is unconstitutional. Town of Deerfield, New York v. FCC, 922 F.2d 420 (2d Cir. 1993) (a judgment entered by an Article III court having jurisdiction to enter that judgment is not subject to review or alteration by an administrative agency like the Commission). Under the separation of powers doctrine of the Constitution, no administrative agency may usurp the adjudicatory functions of the District Court to interpret and enforce its decree. As the Supreme Court stated in U.S. v. Morton Salt Co., 338 U.S. 632, 643 (1980):

> [an independent regulatory] Commission cannot intrude or usurp the court's function of

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[7/] The BOCs seek to provoke such a confrontation with language such as the following: "The time has come, then, for the Federal Communications Commission to recapture its statutory mandate to oversee competition in telecommunications." Petition, at 2.

> adjudication. The decree is always what the court makes it; the court's jurisdiction to review is and remains exclusive, its judgment final.

Apart from adherence to the constitutional separation of powers doctrine, another basis for dismissing the Petition is for considerations of federal comity. Although federal courts and administrative agencies at times have overlapping jurisdiction, they traditionally have attempted to avoid conflicts. In the past, the District Court admonished a former Commission Chairman for statements that were "[a]n incitement to [BOC] noncompliance" with the decree. U.S. v. Western Electric Co., 1987-2 Trade Cases (CCH) ¶67,783 at 59,222 (D.D.C. Dec. 3, 1987). The District Court explained that "entities with possible jurisdictional overlay . . . normally seek to avoid rather than to create friction." Id. Consistent with this view of federal comity, the District Court declined to order a change in IXC dialing parity in advance of the FCC-required change-over. U.S. v American Telephone & Telegraph Co., 552 F. Supp. 131, at 197. The Court also declined to require the Commission to allow the BOCs' initial access charge tariffs to become effective concurrently with the January 1, 1984, divestiture from AT&T. U.S. v Western Electric Co., 578 F. Supp. 653, 656 (D.D.C. 1983).

The Commission also previously attempted to avoid conflicts with the antitrust court. For example, the Commission has waived the substantive requirements of its access charge rules to allow the BOCs to comply with the equal access requirements of the MFJ. MTS and WATS Market Structure, 97

F.C.C. 2d 834, 854-55 (1984). Additionally, the Commission waived its transport charge rules so that the Bell Companies could comply with relevant provisions of the MFJ. American Telephone and Telegraph Co., 94 F.C.C. 2d 545 (1983); MTS and WATS Market Structure, 97 F.C.C. 2d 682, 738-39 (1983).

The Commission also consistently has recognized that it may not reinterpret or override the provisions of the antitrust consent decree governing the Bell Companies, notwithstanding any disagreement it may have with the District Court. Referring to the 1956 AT&T antitrust consent decree which the MFJ replaced, the Commission stated that "[w]e recognize that the court with jurisdiction over the decree is the proper body to render any definitive construction of the decree." Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 72 F.C.C. 2d 358, 432 (1979). See also Final Decision 77 F.C.C. 2d 384, 492 (1980). Subsequently, the Commission affirmed that it may not interpret the scope of the MFJ's restriction on the BOCs. Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C. 2d 958 at 1012 n. 160 (1986). In this case also, the Commission's authority to regulate in the public interest under the Communications Act does not override the District Court's jurisdiction under the antitrust laws to enforce and interpret the MFJ.

In sum, the BOCs' Petition clearly is a collateral attack on the District Court's decision to retain the interLATA

restriction and the Court of Appeals' affirmance of that decision. Even if it lawfully could do so without contravening the separation of powers doctrine -- which it cannot -- the Commission should not allow itself to be manipulated in the BOCs' attempt to circumvent the judicial review process. Because only Congress has the authority to modify the antitrust laws to authorize activities that the courts have proscribed, the Commission has no alternative but to dismiss the BOCs' petition.

C. Grant Of The Petition Would Entail The Waste Of Scarce Commission And Private Sector Resources.

The Commission's current severe budgetary concerns and resource constraints are well known. Former FCC Chairman Alfred Sikes had acknowledged that the FCC's lack of personnel and resources was jeopardizing its ability to enforce its regulatory requirements. Before a Senate appropriations subcommittee, Chairman Sikes warned that, even if Congress granted the FCC its full 1991 budget request, the Commission still would have "20 percent less in revenue and human resources than it enjoyed in 1981."[8/] Chairman Sikes pointed out that, during the 1980s, the "resources available for the enforcement of our rules and regulations attenuated greatly," which "necessitated cut-backs in a number of enforcement efforts." Id. at 5-6. Chairman Sikes

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8/ Statement of Alfred C. Sikes, before the Subcommittee on Commerce, Justice, State, and Judiciary, Committee on Appropriations, United States Senate, on Federal Communications Commission Fiscal Year 1991 Appropriations Request (February 21, 1990) at 5.

reiterated later that the FCC's "real resources problem . . . scares me."[9/]

The resource crisis at the FCC has only worsened in the 1990s. FCC Commissioners have publicly acknowledged the "severe resource problems facing the FCC," problems which have been aggravated by the mammoth task of implementing the 1992 Cable Act. See Letter from FCC Commissioners to Hon. Ernest F. Hollings (June 4, 1993), at 1. Acting FCC Chairman Quello testified before Congress that:

> Budgetary constraints have handicapped our ability to hire talented professionals to grapple with the tremendously important and complex issues we fact. During the last dozen years the FCC has seen its ability to function effectively stretched to the breaking point by budget constraints.[10/]

In other testimony, Acting Chairman Quello emphasized: "I cannot say more plainly that this is an agency already stretched to, and in many places beyond, its capacity."[11/] Characterizing the FCC as "understaffed" and "underfinanced," Chairman Quello confirmed House Commerce Committee Chairman Dingell's analysis that the FCC has tried to "borrow from Peter

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9/ "Sikes Concerned About FCC's Growing Lack of Resources," Communications Daily, July 20, 1990, at 3.

10/ See Statement of James H. Quello, FCC Chairman, Before the Subcommittee on Commerce, Justice, State, and Judiciary, Committee on Appropriations, United States House of Representatives, March 25, 1993 at 2 (Summary) ("March Quello Statement").

11/ See Statement of James H. Quello, FCC Chairman, Before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, United States House of Representatives, June 17, 1993 at 16 ("June Quello Statement") (emphasis in original).

to pay Paul" by using resources from other FCC bureaus, including the Common Carrier Bureau, to implement the 1992 Cable Act. March Quello Statement at 3. Acting Chairman Quello estimated that 50% of the existing understaffed Common Carrier Bureau accounting group might have to be diverted to Cable Act implementation. June Quello Statement at 8. As a result, he concluded that the Commission's ability "to meet our other obligations under the Communications Act has been strained to the breaking point." Id. at 6. In the face of all this, absent a supplemental appropriation from Congress, the Commission was faced with the prospect of furloughing its staff for one or more days each month for budgetary reasons. See, e.g., Communications Daily, April 9, 1993, at 1.

In light of the Commission's continued scarcity of resources, it would be imprudent for the Commission to waste its available resources on an issue over which the Commission has no authority. The issues raised by the BOCs are contentious, as exemplified by the 300 briefs and the over 6,000 pages of material submitted to the District Court in the triennial review proceeding. Moreover, it is likely that just as many private parties would participate in an FCC rulemaking initiated in response to the Petition as participated in the triennial review proceeding. For example, the many new IXCs that have been formed since the triennial review likely would participate because their very creation and continued existence is premised upon enforcement of the MFJ interexchange prohibition, at least for

the foreseeable future and until a meaningful and substantial change has occurred with regard to the development of effective competition at the local exchange level.[12/] These emerging new IXC competitors could spend their limited resources better on developing new markets and new services than in a wasteful expenditure of time and money on the speculative issue of how the Commission should regulate services which the BOCs are not authorized to provide.

Indeed, notwithstanding the vast resources that likely would be expended in the rulemaking proceedings requested by the BOCs, the efforts of the Commission and the private parties would go for nought, absent action by one of the branches of government (the courts or Congress) that has authority to act on this matter. Under these circumstances, it would be more prudent for the Commission to devote its resources to those issues over which it has control and to decline to act in areas where it has no authority. There will be time enough for the Commission to consider the development and implementation of effective safeguards to protect against BOC anti-competitive activity if and when the interLATA restriction is lifted.

[12/] Moreover, unlike in federal court proceedings, parties interested in participating in an FCC rulemaking need not be concerned with obtaining intervenor status or being represented by a member of the district court bar.

III. NON-STRUCTURAL SAFEGUARDS SUCH AS THOSE PROPOSED BY THE BOCs CANNOT PROTECT COMPETING IXCs ADEQUATELY FROM DISCRIMINATORY AND ANTI-COMPETITIVE ACTIONS BY BOCs ALLOWED TO PROVIDE INTEREXCHANGE SERVICES.

Only in the event that the District Court or Congress grants the BOCs relief from the interexchange prohibition of the MFJ, should the Commission initiate a rulemaking to determine the conditions under which the BOCs would be allowed to provide interLATA services. Any prior Commission action that can be perceived as the least bit sympathetic to the BOCs' request for relief only will encourage the BOCs to begin engaging in cross-subsidization and discrimination against their potential IXC competitors. The District Court already has recognized this BOC predilection:

> [I]f the companies perceive themselves as future long distance competitors, they will have incentives to spend ratepayer funds for long-distance network construction and to position themselves for successful entry by discriminating against other carriers . . . .

U.S. v. Western Electric Co., 592 F. Supp. 846, 868 (D.D.C. 1984).

It is undisputed that if the BOCs are allowed to enter the interexchange market that they will have the incentive to discriminate against their IXC competitors. Moreover, contrary to their claims, the BOCs continue to possess the means to discriminate against competing IXCs through their control of the monopoly bottleneck exchange. The nonstructural safeguards proposed by the BOCs clearly would not be sufficient to protect

IXC competitors who have no current alternative to utilizing BOC bottleneck exchange access facilities.

A. The BOCs Continue To Possess Bottleneck Control Over The Exchange Facilities Required By IXCs To Originate And Terminate Traffic.

In the triennial review proceeding, the DOJ acknowledged that exchange services continue to be monopolies and that the BOCs continue to retain their monopoly power over the local exchange bottleneck. See 673 F. Supp. at 537. The District Court found that "99.9 percent of all interexchange traffic, generated by 99.9999 percent of the nation's telephone customers, is today carried entirely or in some part" by the BOCs (or other monopoly local exchange carriers). Id. at 540. Just three months ago, the D.C. Circuit reaffirmed that "[i]t is undisputed that the BOCs have monopolies over local telephone exchange services in their respective service areas." U.S. v. Western Electric Co., 1993-1 Trade Cases (CCH) ¶70,259 at 70,296 (D.C. Cir. 1993). The Commission also has affirmed that the BOCs continue to retain substantial monopoly power through their local bottleneck networks. See, e.g., Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6790-91 (1990). None of the BOCs' arguments about potential future competition in the local exchange alter the fundamental conclusion -- upon which the DOJ, the District Court, the Court of Appeals and this

Commission agree -- that the BOCs continue to possess almost absolute monopoly control over local exchange services.[13/]

In fact, none of the claimed new local exchange competitors has assembled a network that poses any realistic threat to the BOCs' dominant market power in the local exchange for the near future. For example, what the BOCs claim to be "on customers' premises" competition from inside wire and private branch exchanges ("PBXs"), Petition, at 15, has no meaningful effect on the BOCs' bottleneck control. Inside wire is not a substitute for exchange access, and the District Court already has found that the advent of more widespread utilization of PBXs "has not significantly reduced, if at all," the local exchange bottleneck. 673 F. Supp. at 538.

Wireless communications also fail to presently provide a significant competitive alternative to the BOCs' landline exchange network. Personal communication services (PCS) are still years away from implementation, and no one seriously suggests that cellular will replace the landline exchange network in the near term. Cellular carriers today use the BOCs' local exchange bottleneck to complete 99 percent of all their calls, and the rates for cellular service clearly are not competitive

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[13/] The Commission should not countenance the BOCs' absurd claim that the interexchange marketplace is not sufficiently competitive because three major IXCs share 87 percent of the revenue, Petition at 11, but that the local exchange marketplace -- in which each of the petitioning BOCs holds a 99 percent market share -- is competitive.

with the BOCs' wired networks.[14/] Moreover, although competitive access provider (CAPs) and cable company networks hypothetically could constitute effective competition to the BOCs' local exchange one day, that day is still far in the future.

All interexchange carriers today must rely almost exclusively on BOC facilities to originate and terminate interLATA calls. They have no alternative because the BOCs currently possess 99 percent of the local exchange market. All the potential competition the BOCs might face in the future from wireless providers, CAPs and cable companies does not change the fact that today -- and for the foreseeable future -- the BOC local exchange remains an essential, monopoly bottleneck facility and, thus, that the BOCs possess dominant market power.

B. The Commission Could Not Design Non-Structural Safeguards Sufficiently Stringent To Protect Competing Interexchange Carriers Against BOC Cross-Subsidization And Discrimination.

If the BOCs were allowed to provide interLATA services, they would be the only "integrated" providers capable of providing end-to-end interLATA services to all customers while other interexchange service carriers would be forced in whole or in part to utilize BOC bottleneck facilities. As documented in

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[14/] In Washington, D.C., the C&P monthly rate for measured services is $7.47 plus 7 cents for each call over 60 while the Bell Atlantic cellular fixed monthly charge is over 5 times greater ($43.95) with usage charges of 50 cents per peak period minute above the standard allotment. Obviously, cellular telephone service is not today a competitive alternative to telco-provided local exchange service.